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SUBJECT: Ortega's Judicial Coup: Legal Experts Denounce Court's
Decision

REF: MANAGUA 1035

¶1. (SBU) Summary: In the weeks after the Supreme Court's (CSJ) decision to allow President Daniel Ortega to run for re-election in 2011, legal experts have denounced the judicial ruling as "illegal," "unconstitutional," and "invalid." Experts describe the ruling as such for technical/administrative and substantive reasons. Following are the main reasons the experts point to in describing the ruling as illegal and unconstitutional. This is based on our discussions with legal experts as well public statements by law professors, CSJ magistrates who did not partake in the re-election ruling, and a communiqué from the Nicaraguan Academy of Judicial and Political Science. The academy includes Alejandro Serrano, who was the chief justice of Nicaragua's Supreme Court during the Sandinista National Liberation Front (FSLN) government of the 1980s. End Summary.

The Ruling

¶2. (U) As reported reftel, the Constitutional Chamber of the CSJ ruled on October 19 that the Constitution had contradictory clauses in that it states that every citizen is equal under the law, but prohibits the re-election of sitting presidents and limits any citizen to two terms as president. The Constitution also prohibits the re-election of mayors. As a result, the chamber ruled that the Constitution's article 147 and 178 were inapplicable to Ortega and the other plaintiffs (109 FSLN mayors from across Nicaragua). Thus, the court ordered the Supreme Electoral Council to allow Ortega and the FSLN mayors to run for re-election.

Technical, Procedural Failures

¶3. (SBU) The legal experts whose analysis we have reviewed agree that the CSJ ruling is illegal, illicit, and invalid from the very beginning of the case based on two procedural shortcomings - (1) the composition of the chamber that took the decision was illegal and (2) the court should never have accepted the case. As described in reftel, the judges who signed the ruling were not the judges with the authority to vote on the case. Francisco Rosales, president of the Constitutional Chamber, convened the chamber with only FSLN magistrates and the alternates ("suplentes") of these same FSLN judges. None of the Liberal magistrates, nor their alternates, were present at the court's ruling. According to legal experts, the Constitution (article 163) and the CSJ's own statutes describe the procedures for convoking the magistrates and alternates, and Rosales did not comply with these legal requirements in convening the chamber.

¶4. (SBU) The second procedural problem with the court's ruling was that the case should never have been accepted by the judicial system. The case began when Ortega and the other plaintiffs asked the Supreme Electoral Council (CSE) to rule on what they viewed as contradictory clauses of the Constitution. The CSE's determination to the plaintiffs was that it was not the competent authority to rule on the matter. In its ruling, the chamber argues that the CSE aggrieved the plaintiffs and therefore the court needed to step in to protect the rights of these particular citizens. However, all the experts agree that no person was aggrieved. The experts point to Nicaragua's "Ley de Amparo" (Law of Protection under the Law),

MANAGUA 00001077 002.2 OF 003

which states that "an appeal for protection under the law may be filed against a government official or authority which has issued an order presumed to violate the Constitution." In this case, neither Ortega nor his fellow plaintiffs had been wronged since the CSE simply stated that it was not the competent authority to decide the matter. Moreover, the Liberal magistrates of the Court point out that there is no legal redress against the Constitution itself.

No Substance

¶5. (SBU) Aside from the technical failures of the ruling, experts point to the substantive failures of the sentence and characterize the chamber's arguments as a "distortion of equal rights." The ruling states that the plaintiffs are being treated unequally and discriminated against by not allowing them to run for re-election. Since the incumbents of other offices are allowed to run for re-election (e.g., National Assembly deputies), the chamber argues, then the plaintiffs are being denied their equal rights. However, experts note that this argument is false since the people are treated equally - i.e., everyone can be president twice. The experts point out that "equals" are treated equally, so President Ortega may exercise the same political rights as other former Nicaraguan presidents. Simply put, you can't compare apples and oranges.

¶6. (SBU) More important than the misinterpretation of equal rights, however, is that the experts (and the public in general) denounce the chamber's decision because it is, in itself, unconstitutional. In its ruling, the CSJ states that Ortega and his fellow plaintiffs are being treated unequally, thus Article 147 of the Constitution is not applicable to them. (Note: the ruling states that the decision is effective "inter-parte" - i.e., only to those party to the case - and shall be reviewed by the full CSJ for

applicability to the general population.) By ruling that an article of the Constitution should not be enforced, all legal experts agree that the Constitutional Chamber reformed, altered, or revoked the Constitution - a power solely vested in the National Assembly or a constituent assembly. To support their argument, the legal experts cite various articles of the Constitution, including:

- Article 129: defines the separation of power among the executive, legislative, electoral, and judicial branches of government, and stipulates that each is subordinate only to the powers proscribed to it by the Constitution;

- Article 138: defines the authorities vested in the legislature, including reforming laws and the Constitution;

- Article 182: states that the Constitution is the foundation of Nicaraguan law, and that no subsequent law, treaty, order, or judicial ruling that opposes or alters the Constitution shall have any validity; and

- Article 191: states the National Assembly has the authority to partially reform the Constitution.

A Premeditated Coup

MANAGUA 00001077 003 OF 003

17. (SBU) Legal experts have not publicly commented on the blatant political motives of the case, but the chamber's own ruling makes it obvious that the sentence was staged. According to the Constitutional Chamber's sentence, the timeline of the case was as follows:

- Thursday, October 15: Ortega and 109 FSLN mayors ask the CSE to rule on what they consider contradictory clauses of the Constitution (i.e., equal rights vs. term limits for presidents and mayors);

- Friday, October 16: the CSE determines it is not the competent authority to decide the matter; Ortega and other plaintiffs file an appeal for protection under the law ("recurso de amparo") with an Appellate Court; the Appellate Court accepts the case and orders it referred to the Constitutional Chamber of the CSJ;

- Monday, October 19:

- o At 12:00 in the afternoon - the Chamber accepts the case and orders all parties (the plaintiffs, Attorney General, and CSE) to present their arguments;

- o 12:00 through 1:00 - all parties present their arguments;

- o 1:00 - Rosales convoked the Chamber to meet at 4:00 to discuss the case;

- o 5:00 - the Constitutional Chamber's ruling is approved, and at 5:30 it notifies the CSE to adhere to the decision; and

- o 7:00 - the CSE magistrates meet and certify the court's ruling allowing Ortega and FSLN mayors to run for re-election.

Comment

18. (SBU) The Constitutional Chamber's ruling to allow Ortega and the FSLN mayors to run for re-election is viewed by legal experts and the general public as illegal, illicit and invalid for both technical and substantive reasons. Moreover, the uncharacteristic alacrity with which the court ruled on the matter further hints at a political motive behind this operation.

SANDERS